

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

NECA-IBEW PENSION TRUST FUND and  
DENIS MONTGOMERY, on behalf of  
themselves and all others similarly situated,

Plaintiffs,

-against-

BANK OF AMERICA CORPORATION,  
KENNETH D. LEWIS, JOE L. PRICE, NEIL A.  
COTTY, WILLIAM BARNET, III, FRANK P.  
BRAMBLE, SR., JOHN T. COLLINS, GARY L.  
COUNTRYMAN, TOMMY R. FRANKS,  
CHARLES K. GIFFORD, W. STEVEN JONES,  
WALTER E. MASSEY, THOMAS J. MAY,  
PATRICIA E. MITCHELL, THOMAS M.  
RYAN, O. TEMPLE SLOAN, JR., MEREDITH  
R. SPANGLER, ROBERT L. TILLMAN,  
JACKIE M. WARD, BANC OF AMERICA  
SECURITIES LLC, CITIGROUP GLOBAL  
MARKETS INC., MERRILL LYNCH, PIERCE,  
FENNER & SMITH INCORPORATED,  
MORGAN STANLEY & CO.  
INCORPORATED, UBS SECURITIES LLC,  
WACHOVIA CAPITAL MARKETS, LLC,  
DEUTSCHE BANK SECURITIES, and J.P.  
MORGAN SECURITIES INC.,

Defendants.

Case No. 10-cv-00440 (LAK) (HBP)

ECF CASE

**BAC DEFENDANTS' RESPONSE TO  
PLAINTIFFS' NOTICE OF RECENT AUTHORITY**

O'MELVENY & MYERS LLP  
Seven Times Square  
New York, New York 10036  
(212) 326-2000

*Attorneys for the BAC Defendants*

The BAC Defendants<sup>1</sup> submit this response<sup>2</sup> to Plaintiffs' June 1, 2012 Notice of Recent Authority attaching the Second Circuit's May 25, 2012 decision in *Panther Partners, Inc. v. Ikanos Communications, Inc.*<sup>3</sup> The allegations and disclosures at issue in *Panther Partners* do not bear any resemblance to those at issue in the Proposed SAC.

First, the plaintiffs in *Panther Partners* alleged that defendants breached a disclosure duty under Item 303 of Regulation S-K by failing to disclose a "known trend or uncertainty [that defendants] reasonably expected would have a material unfavorable impact on revenues or income."<sup>4</sup> The plaintiffs in this case, by contrast, do not allege violations of Item 303 or any failure to disclose "known trends or uncertainties." Thus, the court's analysis in *Panther Partners*, which focuses entirely on Item 303's "known trends or uncertainties," is inapplicable on its face.

Second, the proposed amended complaint in *Panther Partners* included detailed allegations that the defendant knew but failed to disclose "highly negative information" that "it might have to accept returns of a substantial volume, if not all, of the [semiconductors] it had

---

<sup>1</sup> This response uses the following defined terms: (i) "BAC" is defendant Bank of America Corporation; (ii) "BAC Defendants" are defendants BAC, Lewis, Price, Cotty, Barnet, Bramble, Collins, Countryman, Franks, Gifford, Jones, Massey, May, Mitchell, Ryan, Sloan, Spangler, Tillman and Ward; and (iii) the "Proposed SAC" is Plaintiffs' proposed Second Amended Complaint, dated March 15, 2012 [Dkt. No. 63]. Unless otherwise specified, all emphasis is added and all internal citations, quotation marks, and brackets are omitted.

<sup>2</sup> Defendants Citigroup Global Markets Inc., Deutsche Bank Securities, J.P. Morgan Securities, Inc., Merrill Lynch, Pierce, Fenner & Smith Incorporated (individually and as successor by merger to defendant Banc of America Securities LLC), Morgan Stanley & Co., Inc., UBS Securities LLC, and Wachovia Capital Markets, LLC (n/k/a Wells Fargo Securities, LLC) join in this response.

<sup>3</sup> No. 11-63-cv, 2012 WL 1889622 (2d Cir. May 25, 2012).

<sup>4</sup> *Panther Partners*, 2012 WL 1889622, at \*5; *see also* 17 C.F.R. § 229.303(a)(3)(2) ("Describe any *known trends or uncertainties* that have had or that the registrant reasonably expects will have a material favorable or unfavorable impact on net sales or revenues or income from continuing operations.").

delivered to its major customers” due to product defects—“known uncertainties [that] could materially impact revenues.”<sup>5</sup> Here, by contrast, the Proposed SAC does not allege any undisclosed trends or future uncertainties, and Plaintiffs’ Notice does not assert otherwise. Accordingly, *Panther Partners* is inapposite.

Dated: June 11, 2012

Respectfully submitted:

/s/ Jonathan Rosenberg

Jonathan Rosenberg (jrosenberg@omm.com)

William J. Sushon (wsushon@omm.com)

B. Andrew Bednark (abednark@omm.com)

O’MELVENY & MYERS LLP

Seven Times Square

New York, New York 10036

(212) 326-2000

*Attorneys for the BAC Defendants*

---

<sup>5</sup> *Panther Partners*, 2012 WL 1889622, at \*7.